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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROYAL & SUN ALLIANCE INSURANCE PLC, *Plaintiff,* - against - UPS SUPPLY CHAIN SOLUTIONS, INC., WORLDWIDE DEDICATED SERVICES, INC., INTERNATIONAL MANAGEMENT SERVICES COMPANY, INC., and TFE LOGISTICS GROUP, INC. f/k/a THE TFE GROUP, INC., *Defendants.*	:	**09 Civ. 5935 (LTS)**

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO IMSCO'S MOTIONS *IN LIMINE TO PRECLUDE TESTIMONY* OF EXPERTS (1) RICHARD P. MILLMAN, M.D., (2) WILLIAM FOGARTY, PHD, AND (3) PAUL PAXTON

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Plaintiff Royal & Sun Alliance Insurance, PLC ("RSA"), by its attorneys, Maloof Browne & Eagan LLC, hereby submits this Memorandum of Law in Opposition to three of IMSCO's Motions *In Limine* to Preclude Testimony of Experts (1) Richard P. Millman, M.D. [D.E. #115], (2) William Fogarty, Ph.D. [D.E. #118], and (3) Paul J. Paxton [D.E. #121] on the following grounds:

RESPONSE CONCERNING
STATEMENT OF FACTS

Each of IMSCO's six motions[1] contained detailed "Introductions," purporting to summarize the facts already established through discovery. Sadly, these "Introductions" are in fact monumental testaments to partisanship, containing erroneous facts and even conclusions of ultimate facts that will have no support at trial at all, for example:

- The tractor-trailer struck the center divider after leaving tire marks which commenced in the number one (left-most) truck lane. (Plouch Memo at p. 3 [D.E. #113])

- "The tire marks…[were] demonstrating significant operator effort to control the vehicle prior to impact." (Plouch Memo at p. 3 [D.E. #113])

- "Crews was braking and turning in an attempt to control the vehicle." (Plouch Memo at p. 3 [D.E. #113])

- "Moreover, Mr. Fenton's analysis establishes that Mr. Crews had turned the vehicle to the left aggressively and braked and was turning back to the right in an effort to avoid impact with the wall when the collision occurred. Plaintiff's own expert Robert Miller confirms that this is an accurate analysis of the vehicle dynamics initiated by Mr. Crews during the crash." (Ramsey Memo at p. 6 [D.E. #125])

In fact, none of these statements are accurate as stated, as will be explained at trial.

IMSCO even goes as far as to repeat obvious hearsay which it knows is

[1] Plaintiff's opposition to the other three IMSCO *in limine* motions regarding Trooper Plouch, Trooper Ramsey, and IMSCO admissions are filed as D.E. # 134 and 135.

inadmissible in the form of a self-serving explanation of the accident by the deceased, James Crews. (Plouch Memo at p. 5 [D.E. #113]).

Finally, IMSCO further mischaracterizes Plaintiff's position as being that Mr. Crews "was asleep or falling asleep" at the time of the accident, ignoring the more obvious risk of him being merely inattentive. (Plouch Memo at p. 3 [D.E. #113])

Plaintiff does not believe that it is obligated to try the facts of the case on these motions *in limine*, and we will not respond to all of the errors. Instead, we simply request that the Court ignore IMSCO's "Introductions" and purported statements of fact, except as they relate directly to the witnesses at issue.

ARGUMENT

I.

DR. MILLMAN SHOULD BE PERMITTED TO TESTIFY

After asserting in its pre-motion communication that it was only moving to exclude the opinion of Richard P. Millman, M.D. as it relates to opinions concerning the events on the day of the accident, IMSCO now moves to preclude his testimony entirely. IMSCO, now argues, in effect, that:

1. Dr. Millman is not qualified to give an opinion to a reasonable degree of certainty as to whether or not Mr. Crews had obstructive sleep apnea from his complete medical records without examining him visually.

2. Dr. Millman is not qualified to opine that sleep apnea increases the risk of fatigue.

3. Dr. Millman is not qualified to opine that a person with Mr. Crews' characteristics should be tested for sleep apnea before being granted a commercial drivers license.

4. Dr. Millman's opinions are not "relevant" to the cause of the loss.

Each of these arguments is seriously flawed.

First, Dr. Millman is fully qualified to provide an opinion on Mr. Crews' medical condition. To begin with, he is one of the nation's leading experts (and researchers) on diagnosing sleep apnea, running the sleep research center at Brown University. (Ex. 1[2], Millman Expert Report, Curriculum vitae pp. 1-26).

Second, he had the full panoply of Mr. Crews' medical records over several years to review. (Ex. 1, Millman Expert Report, Appx. A).

Third, he has the fact that Mr. Crews was diagnosed with sleep apnea upon his admission to the Arkansas Children's Hospital Burn Unit, so all Dr. Millman is actually opining on is that he agrees with that hospital's diagnosis. (Ex. 2, excerpts of Arkansas Children's Hospital Burn Unit medical records). Contrary to IMSCO's statements, this diagnosis is contained in separate records signed by both a physician and a patient care planner. Moreover, Dr. Millman's own study,[3] explains the critical factors in assessing the risk of sleep apnea in Type 2 Diabetics, a disease Mr. Crews suffered from, finding that Type 2 Diabetics with a BMI of over 35 kg/m^2 have virtually a 100% chance of having the disease. Mr. Crews' BMI was 43.8 kg/m2. *See* Ex. 1, Millman Report, discussion at p. 3.

Dr. Millman is also fully qualified to opine that obstructive sleep apnea dramatically increases the risk of fatigue,[4] and the risk of accidents, as he is, again, one of the nation's leading researchers in this area, and references numerous authoritative studies in his opinions, including the following (the first of which he authored):

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[2] The references to Exhibits 1 - 6 are to those in the attached Declaration of Thomas M. Eagan, Esq.

[3] Foster G, Sanders M, Millman R et al. *Obstructive Sleep Apnea Among Obese Patients With Type 2 Diabetes*. Diabetes Care 2009; 32:1017-1019.

[4] IMSCO's complaint that Dr. Millman did not adequately review Mr. Crews' work schedule (in fact he did) is silly because sleep apnea causes fatigue independent of one's work schedule. IMSCO's statement that Dr. Parikh did not entertain a diagnosis for sleep apnea is curious since, thus far, Dr. Parikh has refused to give a deposition. And Dr. Millman reviewed the flaws in detail of the perfunctory physical that Dr. Lee performed (Ex. 1, Millman Report, pp. 2-4).

- Strohl KP, Bonnie RJ, Findley L, Fletcher EG, Getsy J, Kryger MH, Millman RP et al., *Sleep apnea, sleepiness, and driving risk.* Am J Respir Crit Care Med 1994; 150: 1463-1473.

- Wiegand DM; Hanowski RJ; McDonald SE. *Commercial drivers' health: A naturalistic study of body mass index, fatigue, and involvement in safety-critical events.* Traffic Injury Prevention. 2009:10-573-579.

- Stoohs RA, Guilleminault C, Itoi A, Dement WC. *Traffic accidents in commercial long-haul truck drivers: the influence of sleep-disordered breathing and obesity.* Sleep 1994; 17: 619-623

- Pack AI; Pack AM; E Rodgman; et al. *Characteristics of crashes attributed to the driver having fallen asleep.* Accid. Anal. and Prev., 1995; 27: 769-775

- Stoohs, RA, Bingham L, Itoi A et al. *Sleep and sleep-disordered breathing in commercial long-haul drivers.* 1995: 107:1275-1282

- Laberge-Nadeau C, Dionne G, Ekoe J-M, et al.*Impact of diabetes on crash risks of truck-permit holders and commercial drivers.* Diabetes Care 2000; 23:612-617

- Howard ME, Denai AV, Grunstein RB et al. *Sleepiness, sleep-disordered breathing and accident risk factors in commercial vehicle drivers.* Am J Respir Crit Care Med 2004; 170:1014-1021

- Taylor AH, Dorn L. *Stress, fatigue, health, and risk of road traffic accident among professional drivers: The contribution of physical inactivity.* Annu. Rev. Public Heath 2006: 27:2.1-2.21

- Hartenbaum N, Collop N, Rosen IM et al. *Sleep apnea and commercial motor vehicle operators: Statement from the Joint Task Force of the American College of Chest Physicians, American College of Occupational and Environmental Medicine and the National Sleep Foundation* Chest 2006; 130:902-905

- Hartenbaum N, Collop N, Rosen IM et al. *Sleep apnea and commercial motor vehicle operators: Statement from the Joint Task Force of the American College of Chest Physicians, American College of Occupational and Environmental Medicine and the National Sleep Foundation.* JOEM; 2006, 48(number 9 Supplement): S4-S37

- Ancoli-Israel S; Cziesler C, George CFP, et al. *Expert Panel*

Recommendation: Obstructive Sleep Apnea and Commercial Motor Vehicle Driver Safety
Presented to Federal Motor Carrier Safety Administration. January 14th 2008

- Wiegand DM, Hanowski RjJ McDonald SE. *Commercial Motor Vehicle Health and Fatigue Study (Final Report).* The National Surface Transportation Safety Center for Excellence. Feb 11, 2009

- Wiegand DM; Hanowski RJ; McDonald SE. *Commercial drivers' health: A naturalistic study of body mass index, fatigue, and involvement in safety-critical events.* Traffic Injury Prevention. 2009:10:573-579

Ex. 1, Millman Expert Report, C.V. pp. 1-26.

As the leading legal treatise on motor truck accidents has summarized the research:

> Due to interrupted sleep patterns, the sufferer [of obstructive sleep apnea] rarely has restorative rest, manifesting in excessive daytime sleepiness, increased accidents, and more frequent health problems. A considerable body of scientific research has shown the effects of OSA include:
> - 40% increase in Excessive Daytime Sleepiness (Ulfberg, 1996),
> - Twice as many traffic accidents per mile (Horstmann, 2000),
> - Three fold risk of occupational accidents (Ulfberg, 2000).[5]

CCH, *Motor Carrier Liability,* (2007), ¶861, p. 720.

Dr. Millman is thus certainly a highly qualified witness to testify on whether or not all people with Mr. Crews' profile—morbidly obese, type 2 diabetics—who are seeking commercial drivers licenses, should be tested for sleep apnea. Indeed, Dr. Millman's opinion is directly supported in this regard in formal recommendations issued in 2006 by the American College of Occupational and Environmental Medicine and the National Sleep Foundation, as referenced in Dr. Millman's Report at p. 2 (Ex. 1). Similar recommendations were also issued in

[5] The studies cited are referenced in further detail in the treatise.

the Expert Panel Recommendations for Obstructive Sleep Apnea and Commercial Drivers Safety that came in 2008, again as referenced in Dr. Millman's Report at p. 3 (Ex. 1).

Finally, Dr. Millman's opinions are highly relevant to this loss. Mr. Crews' sleep apnea certainly make the existence of the fact that he was inattentive or sleepy on the day in question (especially when combined with the physical highway evidence of minimal if any braking and turning) "more probable…than it would be without the evidence," per FRE 401's definition of the term – "relevant". It further establishes that IMSCO's conduct, in allowing a driver with obstructive sleep apnea to operate a commercial motor vehicle, was *negligence per se,* a critical issue at the trial.

Specifically, concerning the negligence *per se* issue, commercial carriers and drivers are subject to the Federal Motor Carriers Safety Regulations (FMCSRs) 49 C.F.R. § 390 *et seq.*. The FMCSRs govern all operations and driving of commercial motor vehicles. Section 49 C.F.R. § 392.1 entitled: "Scope of the Rules in This Part" reads:

> Every motor carrier, its officers, agents, representatives, and employees responsible for the management, maintenance, operation, or driving of commercial motor vehicles, or the hiring, supervising, training, assigning, or dispatching of drivers, shall be instructed in and comply with the rules in this part.

49 C.F.R. § 392.1. Here, IMSCO was clearly providing services governed by the FMCSRs and was required to comply with all of the DOT regulations. *Id.*

Under the FMCSR's, drivers are specifically prohibited from driving ill or fatigued:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it

> unsafe for him/her to begin or continue to operate the commercial motor vehicle.

49 C.F.R. § 392.3.

Additionally, under the FMCSR's there are physical qualification requirements for operating a commercial motor vehicle. The physical qualifications for drivers are found in § 391.41 which reads in relevant part:

> (b) A person is physically qualified to drive a commercial motor vehicle if that person--
>
> *****
>
> (9) Has no mental, nervous, organic, or functional disease or psychiatric disorder likely to interfere with his/her ability to drive a commercial motor vehicle safely;

49 C.F.R. § 391.41.

The FMCSRs provides an advisory criteria to medical examiners which reads in relevant part:

> Since a driver must be alert at all times, any change in his or her mental state is in direct conflict with highway safety. Even the slightest impairment in respiratory function under emergency conditions (when greater oxygen supply is necessary for performance) may be detrimental to safe driving.
>
> There are many conditions that interfere with oxygen exchange and may result in incapacitation, including emphysema, chronic asthma, carcinoma, tuberculosis, chronic bronchitis and **sleep apnea**. If the medical examiner detects a respiratory dysfunction, that in any way is likely to interfere with the driver's ability to safely control and drive a commercial motor vehicle, the driver must be referred to a specialist for further evaluation and therapy. (emphasis supplied).

See instructions for Respiratory Dysfunction § 391.41(b)(5) at http://www.fmcsa.dot.gov/rules-regulations/administration/medical.htm. Sleep apnea is a respiratory dysfunction and illness that results in a loss of consciousness without warning.

Here, we will establish at trial that the driver was diagnosed (post-accident) with sleep apnea, uncontrolled diabetes (and neuropathy) and was therefore in fact driving at the time of the accident with at least two illnesses that caused fatigue, a clear violation of the applicable safety regulations. *See i.e.,* 49 C.F.R. § 392.3.

When a driver is found to have violated a safety statute, ordinance, or regulation intended to protect a class of persons that includes the victim, such a violation is evidence of a defendant's per se negligence.[6] *Darling v. J.B. Expedited Services, Inc.*, 2006 WL 2238913 at *20 (M.D. Tenn. 2006); *see also Fortner v. Tecchio Trucking, Inc.,* 597 F. Supp. 2d 755, 757 (E.D. Tenn. 2009) (violation of FMSCRs constitute negligence *per se*); *Scarborough v. Brown Group, Inc.,* 935 F. Supp 954, 964-65 (W.D. Tenn. 1995) (violation of a safety regulation by a commercial driver that was enacted to promote safety on the roads supports the finding of *per se* negligence); *Darling at *21; Lowe v. General Motors Corporation*, 624 F.2d 1373, 1379 (5th Cir. 1980) (violation of a federal motor safety regulation is *per se* negligence); *Pratico v. Portland Terminal Company,* 783 F.2d 255, 265 (1st Cir. 1985) (breach of a federal law regulation can be evidence of negligence *per se*).

Medical specialists can testify on the effects of the illnesses they regularly treat. They can diagnose illnesses (and their cause) without conducting a physical examination, where there are sufficient records. *Peteet v. Dow Chemical Co.,* 868 F.2d 1428, 1431-32 (5th Cir. 1989), *cert. denied,* 493 U.S. 935 (1989) (doctor may testify as to causation based on an examination of medical records, of plaintiff's deposition, and of the medical literature), and can also utilize reliable statistical data, *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1012-13 (6th Cir. 1993) (opinion re cause of cancer can be given based on statistical incidence of cancer among particular plant workers). They can also testify on the standard of care of physicians in their field. *Finnegan v. University of Rochester Medical Center,* 34 Fed. Appx. 26 (2d Cir. 2002) (medical experts alone can testify as to standard of care in medical community); *LaMarque v. N. Shore U. Hosp.*, 227 A.D.2d 594, 594-95, 643 N.Y.S.2d 221 (N.Y. App. Div. 2d Dept. 1996) (same).

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[6]The FMC regulations violated here relate to issues of public safety and the requirement to have all drivers qualified after a proper medical examination directly relates to the effort to avoid crashes like the one that occurred here. "The FMCSR certainly relates to issues of public safety." *Darling v. J.B. Expedited Services, Inc.*, 2006 WL 2238913 at *20 (M.D. Tenn. 2006). "Generally, a claim of negligence *per se* may be supported only by statutes and regulations relating to public safety, such as health regulations and rules of the road." *Scarborough v. Brown Group Inc.,* 935 F. Supp. 954, 964-65 (W.D. Tenn. 1995). Illness and fatigue in a driver is subject to the regulations: "FMCSR § 392.3 emphatically prohibits the dispatch of fatigued drivers irrespective of the cause and notwithstanding the role which the drivers themselves may play in producing this dangerous condition." *Gaibis v. Werner Continental, Inc.*, 565 F. Supp. 1538, 1550 (W.D. Penn. 1983).

The single case cited by IMSCO against Dr. Millman, *U.S. Xpress, Inc. v. American Field Service Corp.,* 2008 WL 2714635 (N.D. Miss. 2008) denied the physician there (Dr. Rappai) the right to testify only on one subject, "what occurred on the night of the accident in question." But Dr. Rappai, while knowledgeable on sleep apnea, unlike Dr. Millman, was not a published expert on the actual effects of sleep apnea in motor vehicle accidents. And the testimony at trial here will show that Mr. Crews in fact actually has more of the symptoms and characteristics of a patient suffering from serious sleep apnea (excessive snoring, BMI over 40, neck size grater than 17, diabetes, hypertension, heart disease, etc.) than the driver in *U.S. Xpress.*

Dr. Millman should be permitted to testify. His testimony is directly relevant.

II.

DR. FOGARTY SHOULD BE
PERMITTED TO TESTIFY

Dr. William Fogarty is one of the nation's leading accident reconstructionists. His background in that regard is without parallel as to its depth. As he has summarized:

> By way of background, per my CV, Exhibit A, I have a

Bachelor's degree in civil engineering from the University of Miami, a master's degree in civil engineering from Purdue University, and a doctorate from Georgia Tech My major area of study was transportation engineering. My minor areas of study were statistics, operations research, and planning. I have also received training in dynamics and physics at the undergraduate level.

I taught initially for two years at Purdue University in the College of Engineering and the School of Civil Engineering. I was teaching full time for two years while I got my master's part time in two years. I then joined the staff at the University of Miami's Department of Civil Engineering in 1961, where I taught full time for 34 years. I taught transportation engineering which dealt with highways, rail, air, water, pipe, and conveyer systems relative to research, teaching, and consulting for planning, design, construction, operations, maintenance, and safety.

I also taught in the area of accident reconstruction at the undergraduate and graduate levels in the Department of Civil Engineering. After leaving the University of Miami, I became an adjunct faculty member, putting together a graduate program for the Department of Industrial Engineering, in accident reconstruction.

I have taught seminars and short courses at programs sponsored by the Department of Transportation's National Highway Traffic Safety Administration, at the University of Southern California, The University of Kansas, The University of Florida, and the University of Kentucky-Lexington. I've taught for the University of Miami in the graduate Department of Industrial Engineering. My courses dealt with teaching engineers medical terminology and causation.

I have attended over a dozen workshops with NHTSA from 1969 through 1982. Topics included within these workshops were human factors elements, areas of fatigue, transitional states, and states of sleep. At the graduate level, my major professor headed an accident study team at Georgia Tech.

While at the University of Miami, I applied to the Federal Government to gain research in accident reconstruction. During a continuous 13 year research period at the University of Miami, with 13 annual contracts being awarded to us, I attended various seminar short courses at the University of

> Southern California, at the University of Indiana, at Aerlie House in Virginia, and at the NHTSA headquarters in Washington, D.C. I attended 12 of the NHTSA short course offerings dealing with multidisciplinary accident reconstruction over my 13 years of research for NHTSA.
>
> From 1969 to 1982, I was the founder, Principal Investigator, and head of the team which did research for the Federal Government as a regional research team into the causes of motor vehicle accidents. I had seven southeastern states of responsibility. The conduct of the research dealt with approximately 3,500 motor vehicle accidents over the 13-year period and specific kinds of accidents. In Dade County, Florida alone we attended 10 percent of the 6,200 single vehicle accidents that occurred that year and collected data, did the analysis on each of the cases, submitted individual case reports, and then did a final and executive report on single vehicle accidents available from NHTSA.

See Fogarty Declaration in Support of Motion to Exclude/Limit the Testimony of Stephen Fenton. (D.E.#111-13). *See also* Ex. 3, Fogarty Report and Ex. B thereto.

Dr. Fogarty's conclusions are not solely the result of reviewing "photographs," as IMSCO asserts. To the contrary they are based upon, *inter alia*:

- USDOT and NHTSA protocols for the publication *Program Matrix.*
- His experience reviewing single vehicle collisions for the NHTSA over a 13 year period as head of the Southeastern Regional MOAI team (seven U.S. states).
- His own research in the National Single Vehicle Accident Study which he authored.
- Physical evidence on the road surface.
- Knowledge of the co-efficient of friction on certain highway markings.
- Highway measurements taken as per his direction by co-expert Paul

Paxton.[7]

- Deposition of Arkansas State Trooper Jeffrey Plouch.

- Deposition of Arkansas Corporal Jeff Ramsey.

- Review of Expert's Reports (Fenton & Rose of Kineticorp, Dr. Krueger, Mr. Chewning, Dr. Ayers, Mr. Paxton, Dr. Pesuit, Dr. Millman).

- Review of other Depositions (Charles Harrison, Daniel Bullock).

- Weather Forecast for Bryant Arkansas, 3/26/09.

- Cargo Claim Document 1-13.

- UPS Freight Electronic First Report of Accident.

- *Determining Vehicle Steering and Braking from Yaw Mark Striations,* an article referred by Stephen Fenton.

- Plaintiff's Second Amended Complaint.

- Arkansas Crash Report.

- Drivers Daily Logs.

- IMSCO Injury Report

- NTSB Case Studies

Ex. 3, Fogarty Report; Ex. 4, Fogarty Supplemental Reports.

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[7] A trained accident reconstructionist, Daniel Bullock, located in Arkansas, also took measurements for the Plaintiff, and Dr. Fogarty reviewed them and his deposition. He further reviewed the photographs and a third set of measurements taken by Defendant's experts. Dr. Fogarty's decision that he did not need to personally review the scene a year after the events, as Mr. Fenton did for IMSCO, and take yet another set of measurements, given the plethora of photographs and measurements already taken, was a permitted choice not to elevate form over substance. *Balderas v. Starks*, 138 P.3d 75, 82-83 (Utah App. 2006); *see also Gorman v. Hunt,* 19 S.W.3d 662, 670 (Ky. 2000) (holding that expert could testify about position of vehicles at time of impact even though he had not personally viewed scuff marks, because he relied on testimony of investigating officer); *Tobeck v. United Nuclear-Homestake Partners,* 85 N.M. 431, 512 P.2d 1267, 1273 (N.M. App. 1973) (holding that expert had proper foundation to testify because his opinion was based, in part, on "photographs of the scene of the accident and the vehicles involved").

Dr. Fogarty's testimony utilizes accident reconstruction tools such as the USDOT and NHTSA protocols. It is reliable, and admissible. Accident reconstructionists are routinely permitted to testify. *See, e.g., Jarvis v. Ford Motor Co.*, 283 F.3d 33, 39, 48 (2d Cir. 2002) (accident reconstructionist's theory is question of weight for the jury, not admissibility); *Lidle v. Cirrus Design Corp.*, 2010 WL 4345733 at *3 (S.D.N.Y. 2010) (accident reconstructionist's opinion can be reliable and relevant even without applying strict Daubert criteria); *Morgan v. Girgis*, 2008 WL 2115250 at *4 (S.D.N.Y. 2008) (accident reconstructionist's opinion reliable where expert had access to information about the accident even though he did not visit the site); *Miles v. General Motors Corp.,* 262 F.3d 720, 723-25 (8th Cir. 2001) (accident reconstruction expert was qualified to testify as an expert and the testimony was reliable. Challenges to the expert's methodology and qualifications affected the weight of the testimony and not the admissibility of it); *Bieghler v. Kleppe*, 633 F.2d 531, 533-34 (9th Cir. 1980) (affidavit of accident reconstructionist was sufficient to survive summary judgment and the trial court erred by granting summary judgment).

Defendant's statement that Dr. Fogarty's conclusions are contradicted by "Plaintiff's own expert in computer vehicle dynamics analysis, Mr. Miller," is entirely wrong, because Mr. Miller was only retained to do a technical analysis to determine if PC Crash was a proper tool to reconstruct this accident, given the lack of witnesses and speed and turning data, and he concluded it was not. To now ascribe to him conclusions concerning the cause of the accident, a subject he did not even investigate, is fanciful.

III.

PAUL PAXTON SHOULD BE PERMITTED TO TESTIFY

Paul Paxton's essential opinion is based upon the layout of the Highway I-30 outside Little Rock, Arkansas, where this accident occurred, and given the size and configuration of the lanes, an experienced, alert tractor-trailer operator driving in the center lane (as Mr. Crews states he was) would have more than sufficient room to execute an avoidance maneuver to his left when cut-off by an encroaching vehicle from his right (IMSCO's theory of the case). In fact, his opinion is that such a driver could normally be expected to execute this maneuver without even entering the 12 foot wide emergency breakdown lane. His further opinion is that as this was a restricted highway (trucks not permitted in the left lane), Mr. Crews should have been driving in the right lane (other than for passing), which would have permitted trucks wishing to pass him to pass on the left rather than passing on the right and then having to move in front of him.

His testimony is based upon his own 1.2 million miles of hands-on tractor-trailer driving experience, plus his review of the following:

- Deposition of Charles Harrison, Sr. dated 9/15/2010
- Deposition of Jeffrey Plouch dated 8/25/10 including deposition exhibits1-8
- Deposition of Corporal Jeff Ramsey, dated 10/06/10
- Deposition of Daniel W. Bullock, dated 10/06/10
- Deposition of Karol Beeson and Exhibits, dated 09/13/10
- Deposition of Edward Ridley and Exhibits, dated 09/13/10
- Notice of Deposition of International Management Services Company, INC. dated 7/30/10
- Staffing Services Agreement
- James Crews application of employment with TFE Logistics Group
- Defendants' First Amended Answer to Second Amended Complaint dated 2/5/10
- TFE Driver's Safety Ride/Training manual
- IMSCO New Hire Training Schedule
- DVIR Drill Drive Worksheet
- Policies and Procedures
- Concentra Center Medical Examiner's Report
- James Crews' Georgia Driver License
- James Crews' MVR Report from USIS
- State of Arkansas Death Certificate for James Crews
- Emails between Michael Angle and Ed Ridley
- IMSCO Focus Book

- Bryant, Arkansas weather report
- Cargo Claims documents 1-13
- James Crews' State of Georgia Worker's Compensation paperwork/claim
- WC-14 Notice of Claim from Kenneth Nugent's office
- UPS Freight Electronic First Report of Accident
- Ethicon's Bill of Lading
- 1st Quarter Atl. Doc Safety Meeting dated 2/28/09
- Several internal IMSCO emails regarding James Crew's accident
- IMSCO Injury Report on James Crews
- IMSCO Injury Report on Charles Harrison
- Driver Fitness Report for James Crews
- Driver's hours of service/logs for Charles Harrison from 3/1/09 up to and including 3/20/09
- Driver's hours of service/logs for James Crews from 1/1/09 up to and including 3/19/09
- His own accident scene visit/drive-thru.

Ex. 5, Paxton Report.

Paxton also cites other "foundations" for his opinion, including:

- From the National Safety Council Handbook, A Guide to Determine Motor Vehicle Accident Preventability. (Ex. 5, p. 9).
- From the Federal Motor Carrier Safety Regulations §385.3. (Ex. 5, p. 9).
- From the Federal Motor Carrier Safety Regulations, Defensive Driving. (Ex. 5, p. 10).
- From the State of Georgia Driver's License Manual, Section 2.8.1. – The Importance of Seeing Hazards. (Ex. 5, p. 10).
- From the State of Georgia Commercial Driver's License Manual, Section 2.8.4 – Always Have a Plan. (Ex. 5, p. 11).
- From the State of Georgia Commercial Driver's License Manual, Section 2.11.1-Night Driving-It's More Dangerous. (Ex. 5, p. 11).
- From the Commercial Vehicle Preventable Accident Manual, A Guide to Countermeasures, U.S. Department of Transportation, Federal Highway Administration, Office of Motor Carriers, published by J.J. Keller & Associates, Inc., Third Edition, 1997, Page B8. (Ex. 5, p. 11).

Mr. Paxton also relies on his decades of truck driver training which includes the following:

- State of Ohio, Department of Highway Safety: Ohio Commercial Instructor's License to teach basic, advanced, and defensive commercial truck driving skills and teach the instructor's course, 1991.
- State of Ohio, Department of Education: Licensed to instruct advanced defensive

automobile driving skills. 1970 - 1972.

- National Safety Council: Instructor's Course to teach The Professional Truck Driver Defensive Driving Course; August 1997
- National Safety Council: Instructor's Course to Teach "The Automobile Defensive Driving" Course, May, 1997
- National Safety Council: The updated Vehicle Defensive Driving Course Certificate # 3445524, April, 2008
- National Safety Council: The Updated Professional Truck Driver Defensive Driving Course Certificate #009316, July, 2008
- Hamrick Truck Driving School, Medina, OH - 2005-Present
  Safety Consultant involving the FMCSR, and Truck Driving Safety
- Oklahoma City, OK; Oklahoma County Prosecutor's Office Assist in consulting cases involving Commercial Motor
  Vehicle Incidents/Accidents 2005-Present
- Gulf Power Company, Pensacola, FL - 1998 -Present
  Provided Simulated D.O.T., F.M.C.S.R. Audit and Fleet Safety Assessment.
  On-Going Consulting; Assist in Policy Development
- P. Carter Trucking, Pensacola, FL – 2002 – Present
  On-Going Consulting, F.M.C.S.R. compliance
- Fleetco, Pensacola, FL – 2003 – Present
  On-going consulting, F.M.C.S.R. Compliance
- C & K Industrial Services, Inc., Cleveland, OH - 1995 to 1999
  Safety Specialist. Commercial Driver Skills Training.
  Provided ongoing Safety Meetings and training for new hires and existing medium and heavy truck drivers.
- EnviroServe, Inc., Cleveland, OH - 1995 to 1999
  Safety Consultant for Hazardous Materials Waste Transporter.
  Provided Simulated D.O.T.
  FMCSR Audits and Fleet Safety Assessments.
  Monitor safety aspects of their trucks and drivers.
  Provided Safety Meetings and driver training.
- ProDrive, Inc., Akron, OH, 1990 - 1991
  Commercial Truck Driving Skills Instructor. Licensed by the State of Ohio.
  Taught heavy truck driving skills on the road, in the yard, and in the classroom.
- KLLM Transporters, Jackson, MS, 1987 -1988 (Fleet of over 1200 heavy trucks)
  Placed in Management Development Program. Dispatcher for 65 drivers. Trained for and provided road tests and training trips. Received instruction in F.M.C.S.R. driver hiring, and retention; training; and Safety Department Operations and Procedures. Drove weekend trips.
- Pro Drive Truck Driving School, Instructor's Course, Licensed Instructor by the State of Ohio
- Moore Truck Driving Academy, Instructor's Course (40 hours)
- Schneider National Skid Pad and Jack Knife Training, 60 hours of Basic Truck Driver Training, 40 hour Instructor's Course, Instructor's license
- University of Akron, Auto Driver's Skills & Instructor's Course, Licensed to

teach in the State of Ohio (1969-1970)

- United Truck Master Heavy Truck Instructor's Course
- The Smith System of Defensive Driving trained while driving for Roadway Express and qualified to instruct (Ongoing safety Meetings)
- KLLM Nationwide Carriers (40-hour Defensive Driving course)
- North American Van Lines Skid Pad and Jack Knife training
- Miller Transporters, Inc., 40-hour course, Comprehensive Defensive Driving Course & Loading/Unloading of Bulk Tankers with Chemicals and Gasoline

Ex. 5, Paxton Report, C.V. pp. 1-6. *See also* Ex. 6, Paxton Supplemental Report.

Paul Paxton's decades of hands on trucking driving and truck-driver training actually makes him the expert witness most useful to the Court here in assessing the practical ability and response times of an alert truck driver to avoid encroaching vehicles when he has two lanes (over 24 feet) of open space to his left. *Heatherly v. Alexander*, 421 F.3d 638, 644 (8th Cir. 2005) (truck driver with 43 years of experience permitted to testify as to whether trucker's conduct was safe); *Virginia International Terminals, Inc. v. M/V Katsuragi,* 263 F. Supp. 2d 1025, 1041 (E.D. Va. 2003) (Captain's testimony based on his prior experience as to capability of tug to stop vessel accepted by Court); *Maritime & Mercantile International LLC v. U.S.,* 2007 WL 690094 at *12 (S.D.N.Y. 2007) (Court accepting experienced ship captain's expert testimony from experience that failure to switch radar setting prevented collision-avoiding turn); *Thomas v. Newton International Enterprises,* 42 F.3d 1266, 1269 (9th Cir. 1994) (Court holding that it was abuse of discretion to exclude longshoremen with 29 years experience from testifying as to how an experienced longshoreman would react to an unanticipated dangerous condition, stating that "29 years of longshore experience (alone)…in a variety of job categories" is sufficient to establish expertise concerning expected Longshoreman's reaction under FRE 702 test of "knowledge, skill, experience, training, or education.").

CONCLUSION

For the foregoing reasons, Defendant IMSCO's Motions *In Limine* should be denied.

Dated: Rye, New York
February 22, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2011, the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's CM/ECF system:

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